Supreme Court, U.S.
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No. 00-1205

In The

Supreme Court of the United States

GARY L. WEBB and MELISSA L. WISNER,

Petitioners,

v.

BOARD of TRUSTEES of
BALL STATE UNIVERSITY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

A. Statement of Facts

Gary L. Webb is a member of the faculty of the Department of Criminal Justice and Criminology ("CJC") at Ball State University ("Ball State" or "the University"). Dr. Webb, a tenured Associate Professor, was hired by Ball State in the summer of 1991 and was appointed that year by Dr. John E. Worthen, then President of Ball State University, to a three-year term as Chairperson of the Department. Pursuant to Ball State's *Faculty and Professional Personnel Handbook*, the President has the final responsibility for the appointment, retention and reassignment of department chairpersons. Dr. Worthen subsequently reappointed Dr. Webb effective July 1, 1994 for another three-year term.[1] (R. 63, Exhibits 1-A and 1-B). Petitioner Melissa L. Wisner was Administrative Coordinator of CJC from May, 1996 to March, 1997. (R. 115 at 1293-94).

In April 1994, Dr. Webb reported a matter of alleged sexual harassment of a student by a faculty member in the Department, Dr. Steven Meagher. (R. 111 at 731). The report was made to Dr. Wynola Richards, Director of Affirmative Action and Assistant Provost at Ball State, who contacted the student complainant and arranged for her to be interviewed by a member of her staff in the University Office of Affirmative Action. Dr. Richards then met with Dr. Meagher, and then again with the student. (R. 111 at 734).

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[1] References to the record in the trial court are indicated by "R" followed by the number of the document on the District Court's docket.

Dr. Richards, after consultation with University counsel, concluded that Dr. Meagher's conduct probably did not violate Ball State's sexual harassment policy because of a prior consensual dating relationship between the student and Dr. Meagher, and the fact that the complainant was not a student of his nor was he her supervisor. (R. 63, Exhibit 3). However, Dr. Richards did believe Dr. Meagher's conduct probably violated the University's *Faculty Handbook* provision regarding avoidance of exploitation of students for private advantage. (R. 63, Exhibits 3-A and 3-B). Accordingly, she decided to refer it to the University's Academic Freedom and Ethics Committee ("AF&E") which had jurisdiction over such cases except in matters involving termination of a faculty member. (R. 113 at 824; R. 63, Exhibit 3-C).

Dr. Webb believed Dr. Meagher should be immediately terminated, and was unhappy with Dr. Richards' decision. He met with Meagher on April 22, 1994 and demanded his resignation, threatening to recommend Meagher's immediate termination. (R. 63, Exhibits 3 and 3-F). This was despite Dr. Richards having already advised Dr. Webb that because Dr. Meagher was a regular full-time tenure track faculty member, he could not be fired with less than twelve (12) months' notice unless the University followed the cumbersome due process procedures required to terminate tenure track faculty. (R. 63, Exhibit 3 and 3-G). Dr. Richards also understood at or near this time that it was Dr. Meagher's intention to resign as soon as he could find another position. On May 3, 1994, Dr. Webb proceeded to recommend immediate termination of Dr. Meagher by memorandum filed with Dean Ronald Johnstone of the College of Sciences and

Humanities, to whom Dr. Webb reported on academic affairs. (R. 63, Exhibits 3 and 3-M).

Upon receipt of Dr. Richard's referral, the AF&E Committee began to process the complaint against Dr. Meagher during the summer of 1994, but had difficulty assembling a quorum. (R. 113 at 826; R. 63, Exhibit 4-E). However, on July 15, 1994 Dr. Meagher submitted his resignation from the University. (R. 63, Exhibit 4-O). Shortly thereafter, Dr. Richards withdrew her request that the AF&E Committee review his behavior, because his resignation made the matter moot. (R. 113 at 825; R. 63, Exhibit 3-P).

In September 1994 the AF&E Committee received a complaint from another faculty member in the Department, Dr. Andrew Cotlar, alleging inappropriate behavior, ethical violations, and interference with academic freedom by Dr. Webb. (R. 63, Exhibits 4 and 4-C). Dr. Richards, the Provost's designated representative on the AF&E Committee, advised Dr. Chris Airriess, Chairperson of the Committee, that the AF&E Committee had jurisdiction over the complaint, so Dr. Airriess sent a copy of Dr. Cotlar's complaint to Dr. Webb and invited him to appear in November 1994. (R. 113 at 841-842; R. 63, Exhibits 4, 4-E, 4-G, and 4-H). Dr. Webb declined to appear, instead sending Dr. Airriess a letter stating his opinion that the AF&E Committee should not be investigating Dr. Cotlar's complaint. (R. 63, Exhibit 4-I).

In January 1995, while the AF&E Committee was investigating Dr. Cotlar's complaint, a number of other faculty members in the Department also filed complaints with the AF&E Committee. Dr. Susan Sayles, Dr. James

Hendricks, Dr. Audralee Dallum and Dr. Jerome McKean, all members of the Department faculty, filed complaints against Dr. Cotlar, Dean Johnstone and others. (R.110 at 468; R. 63, Exhibits 4 and 4-P).

While these charges were still pending before the AF&E Committee, Dr. Webb submitted a memorandum to Dr. Richards dated February 28, 1995, which he followed up with a charge against Dr. Cotlar before the Committee, indicating he had just become aware of inappropriate behavior by Dr. Cotlar toward a student a year earlier. (R. 63, Exhibit 3-Q). Dr. Richards interviewed the student and encouraged her to file a sexual harassment complaint, but she declined. (R. 113 at 827-828). On April 6, 1995, Dr. Richards sent the student a memo reaffirming her willingness to help her, but the student did not pursue the matter. (R. 63, Exhibit 3-R). Due to the lack of interest on the part of the victim, and the fact that Dr. Cotlar had resigned and would be leaving the University in approximately one (1) month, Dr. Richards did not proceed further. (R.113 at 827). Dr. Cotlar left the University in early May 1995, at the end of the 1994-95 academic term. (R. 110 at 470; R. 63, Exhibit 3).

In each complaint filed by Dr. Sayles, Dr. Webb, or other Departmental faculty members, the AF&E Committee determined in March 1995 to recommend that no action be taken. (R. 63, Exhibits 4 and 4-P). It did recommend that Dr. Webb be reprimanded as a result of the Cotlar complaint. However, Dr. Webb appealed this recommendation to the Provost, Warren Vander Hill, who overruled the Committee's recommendation. Consequently, Dr. Webb did not receive a reprimand or any

other adverse action as a result of Cotlar's complaint. (R. 109 at 253-54; R. 63, Exhibits 4-O, 4-Q and 4-R).

Dr. Webb was dissatisfied with the AF&E Committee's decisions and with Dean Johnstone's office in general. Shortly after the AF&E decisions, he notified President Worthen that all of the full-time faculty from the Department would attend the April 1995 meeting of the Board of Trustees to present their concerns about the handling of the sexual harassment complaints involving Drs. Meagher and Cotlar, and other issues with the Dean's and Provost's Offices. (R. 63, Exhibit 1-D). The President informed Dr. Webb that such matters should be presented to the appropriate administrative office or University Senate committee. (R. 63, Exhibit 1-E). On June 6, 1995, Provost Vander Hill and Dean Johnstone met with the CJC Department faculty in an effort to get their relationship on a positive track, but to no avail. (R. 63, Exhibits 2-E and 2-F).

On June 30, 1995, Dr. Webb delivered to the President a 225-page memorandum addressed to the Trustees. It complained of alleged mistreatment of Dr. Webb and his Department by the Dean's and Provost's Offices, by the Affirmative Action Office, and others. It requested a hearing before the Board or a subcommittee of the Board. (R. 63, Exhibit 1-F). The President of the Board of Trustees responded on July 17, 1995 and informed Dr. Webb that the Board did not ordinarily intervene in disputes between academic departments and the Dean's or Provost's Offices. Mr. Parks, the Board President, referred the memorandum to President Worthen for further action. (R. 63, Exhibit 1-J).

Dr. Worthen decided to appoint an *ad hoc* Committee to review Dr. Webb's allegations and related issues. He chose four (4) of Ball State's most distinguished tenured faculty, none of whom had any prior relationship to the matters described in the 225-page memorandum. (R.63, Exhibits 1, 1-K and 1-L). The President asked them to review any matters which interfered with or detracted from the common mission of the University and the Department to provide excellent education to Ball State's students. Dr. Webb responded to the President's action with a letter in which he expressed his displeasure and accused Dr. Worthen of retaliation and harassment. (R. 63, Exhibit 1-M).

Shortly thereafter, during the pendency of the *ad hoc* Committee's investigation, Dr. Webb filed a discrimination complaint with the Equal Employment Opportunity Commission in September 1995. Dr. Webb accused the University of harassing him and retaliating against him for the ending of his relationship in late 1993 with Dr. Richards. (R. 63, Exhibit 6-X). Dr. Richards, as Director of Affirmative Action and Assistant Provost, was not Dr. Webb's supervisor, and had no authority over him. (R. 113 at 799, 837-838).

Dr. Webb appeared before the *ad hoc* Committee and provided it with a written statement of his contentions. It also interviewed a number of other witnesses, including Dean Johnstone. On November 21, 1995 the Committee issued a report recommending three possible options, and noting that the situation "defies a simple solution." The recommendations included relieving Dr. Webb as Chairperson in the Department, or removing Dean Johnstone. (R. 63, Exhibit 1-N). Dr. Worthen shared the Committee's

report with both Dr. Webb and Dean Johnstone who each submitted responses to him in December 1995 and January 1996. (R. 63, Exhibits 1-O, 1-P, 1-Q, and 1-R). After considering the Committee's report, its recommendations, and the responses of Dr. Webb and Dean Johnstone, the President determined not to remove either one of them from their administrative positions. (R. 63, Exhibit 1). In February 1996 Dr. Webb again wrote the President and requested a Board hearing. His request was denied by the President. (R. 63, Exhibits 1-R and 1-S).

In November 1996, the faculty in the Department voted to recommend that Dr. James Hendricks become Chairperson when Dr. Webb's term expired on July 1, 1997. On November 4, 1996 Dean Johnstone received a memo from six of the Department faculty regarding their concerns about Dr. Webb's performance as Chairperson, and requesting that the Dean remove him. (R. 63; Exhibit 2-O). During the next three months, the Department was awash in charges and countercharges of harassment, retaliation, discrimination and related matters. Faculty members were accusing Drs. Webb and Sayles, and the Department's administrative coordinator, Melissa Wisner, of various forms of misconduct, and the Petitioners in turn were filing such charges against their faculty colleagues. These charges were filed in the University's Office of Equal Opportunity and Affirmative Action. (R. 63, Exhibits 6-B through 6-I). The new Director of this Office, Sali Falling – who had replaced Dr. Richards following her resignation – issued letters to Webb, Sayles and Wisner requesting meetings with them to discuss the charges and their respective responses to them, if any. None of them took advantage of the opportunity. (R. 63,

Exhibits 6-J through 6-O). Notwithstanding this failure to respond, no action was taken against them as a result of the charges that were filed. (R. 63, Exhibit 6-P, 6-Q and 6-V). This November 1996 alignment of the faculty in the Department was a substantial change from the previous relationships which existed in 1995 and before, when all of the Department's faculty had supported Dr. Webb before the AF&E Committee and the *ad hoc* committee, and in the Department faculty meeting with the Provost and Dean. (R. 63, Exhibit 2).

Between December 1996 and February 1997, Dean Johnstone had given orders to Dr. Webb to cooperate with Dr. Hendricks in preparation for the Department Chair transition in July 1997, and to modify certain administrative orders that Webb had issued. These directives sought to ensure an orderly transition and were also given to the other outgoing Chairpersons in the College. (R. 63, Exhibit 2). Dr. Webb refused to cooperate with Dr. Hendricks or to comply with Dean Johnstone's directives. (R. 63, Exhibit 2-T). Finally, on February 13, 1997, the Dean wrote the Provost and the President a letter recommending the immediate removal of Dr. Webb as Department Chair, citing an atmosphere in the Department he described as "tense and debilitating in the extreme." (R. 63, Exhibit 2-U).

On February 14, 1997 President Worthen sent Dr. Webb a letter which included the Dean's and Provost's recommendations that he be removed as Department Chairperson and invited Dr. Webb to meet with him before he made a decision on removal. (R. 63, Exhibit 1-X). Dr. Webb and President Worthen met on February 27, 1997 and Dr. Webb submitted to Dr. Worthen his

written response to the recommendation of the Dean. The President later determined to remove Dr. Webb from his administrative position, effective March 4, 1997. Dr. Webb suffered no reduction in pay or benefits as a result of this decision. (R. 63, Exhibits 1-Y and 1-Z).

In December 1996, Ms. Wisner filed an EEOC charge alleging retaliation for supporting Dr. Webb, and also claiming that Dr. Hendricks, by then the incoming Department Chairperson, had sexually harassed her. (R. 63, Exhibit 6-DD). In February and March 1997, each of the Petitioners filed additional EEOC charges. These complaints alleged various anecdotal matters believed by the Petitioners to be further retaliatory acts. The University responded to each charge with its position statement. The EEOC did not conclude its processing of any of the charges before the Petitioners requested right-to-sue letters. (R. 63, Exhibits 6-EE through 6-SS).

Petitioner Wisner was appointed by Gary Webb in May 1996 to be administrative coordinator for the Department. The administrative coordinator is required to work closely with the Department Chairperson, as well as the Department faculty. (R. 115 at 1293-94; Exhibit 212). In November 1996, Dr. Norman Beck, then Executive Director of Human Resources and Auxiliary Services at Ball State, became aware that Dr. Hendricks had been elected Chairperson of the Department and that he and Ms. Wisner were not on good terms. Dr. Beck met with Ms. Wisner to see if she was interested in a possible transfer, but she did not follow up on Dr. Beck's offer. (R. 63, Exhibit 7).

When Dr. Webb was replaced as Department Chairperson in March 1997, Dr. Beck determined to transfer Ms. Wisner for the benefit of her, the Department, and the University. Among the reasons for this decision was that during the approximately four (4) months since Dr. Beck had met with her in November 1996, Ms. Wisner had filed two (2) EEOC charges accusing Dr. Hendricks of sex discrimination, retaliation and harassment. Charges had also been filed by Dr. Hendricks against Ms. Wisner with the University's Office of Equal Opportunity and Affirmative Action. (R. 63, Exhibit 7).

Dr. Beck arranged for a lateral transfer for Ms. Wisner to a new position as Programs Assistant in the College of Architecture and Planning. Her salary grade and benefits remained the same as in her former position. Instead of working in a Department Chairperson's office, her new job was in a Dean's Office. She was not required to undergo another probationary period in her new position, but, as is the case for all staff transfers and promotions, she did have a three-month "performance period" which she successfully completed. (R. 63, Exhibit 7). In fact, she received a very positive performance evaluation from her current supervisor resulting in a merit raise. (R. 115 at 1293-1295; Exhibit 212).

B. Course of Proceedings and Disposition In The Court Below

Petitioners commenced this action by filing a forty-eight (48) page complaint on August 4, 1997 in the District Court for the Southern District of Indiana. The complaint was brought against the Board of Trustees of Ball

State University and also against forty-nine (49) individual Respondents in their official and individual capacities. The complaint alleged that the Respondents had violated and conspired to violate the Petitioners' constitutional rights and discriminated against Petitioners on the basis of their sex, in violation of 42 U.S.C. § 1983, § 1985 and Title VII of the Civil Rights Act of 1964.

On October 15 and 29, 1997 Respondents filed motions for summary judgment on all of Petitioners' claims. (R. 59-61, 72, 74). The motions were supported by thirteen detailed affidavits from the Respondents. (R. 63, 75). On October 30, 1997 Petitioners moved for an enlargement of time to respond to Respondents' motions. (R. 76). The District Court granted an enlargement to January 2, 1998 to respond to the motions. (R. 78).

On December 12, 1997 Petitioners filed a motion requesting a preliminary injunction. (R. 80). Attached to the motion were thirty-four (34) pages of affidavits from the Petitioners. On December 29, 1997 the Petitioners filed their responses to the pending motions for summary judgment. (R.87). Attached to this response were an additional thirty-seven (37) pages of affidavits from the Petitioners. At no time between the filing of the complaint in August 1997 and filing their responses to the summary judgment motions did Petitioners seek to conduct any discovery.

The District Court commenced the hearing on Petitioners' application for a preliminary injunction on December 30, 1997 and over the course of six (6) days

permitted Petitioners to present evidence, including calling for cross-examination two of the principal Respondents: Dean Johnstone and Provost Vander Hill. Each Petitioner also testified at length. At the conclusion of Petitioners' evidence, Respondents moved for judgment on the evidence. The District Court granted the motion. (R. 103).

On February 5, 1998 Petitioners filed their notice of appeal from the District Court's decision denying the injunction, and also moved for a stay of proceedings in the District Court. (R. 122, 124). The stay was granted on February 11, 1998 (R. 128). During the pendency of the first appeal, the Petitioners moved for leave to supplement the record in the summary judgment proceedings by submitting additional evidence. (R. 132). The District Court granted the request. (R. 134).

On February 5, 1999 the United States Court of Appeals for the Seventh Circuit affirmed the District Court's denial of the application for a preliminary injunction. *Webb v. Board of Trustees of Ball State Univ.*, 167 F. 3d 1146 (1999) (hereafter, "*Webb I*") (Appendix, p. 110a). The Petitioners' Petition for Rehearing was denied and the mandate received in the District Court on March 18, 1999. (R. 145).

On August 12, 1999 Petitioners moved to have the stay lifted, for leave to file supplemental affidavits, to file a third Amended Statement of Genuine Issues containing citations to the preliminary injunction transcript, and to conduct discovery on issues of intent, disruption and other matters. (R. 147). On August 14, 1999 the District Court vacated the stay and permitted Petitioners to file

the Third Amended Statement of Genuine Issues. Petitioners' request to conduct discovery or file more affidavits was denied.

The District Court granted Respondents' motions for summary judgment against all Petitioners on all claims on January 5, 2000. (Appendix, p. 4a). Petitioners filed their Notice of Appeal on February 2, 2000. (R. 160). On October 25, 2000 the Court of Appeals issued its decision affirming the District Court. No. 00-1319, 2000 U.S. App. LEXIS 27399 (7th Cir. Oct. 25, 2000) (*"Webb II"*) (Appendix, p. 1a).

II. REASONS FOR NOT GRANTING THE PETITION

A. The Court of Appeals conducted an appropriate review of the District Court's Judgment

Petitioners' appeal in *Webb II* raised only two issues: (1) that the District Court abused its discretion by denying their August, 1999 request to conduct additional discovery, and (2) that, because of the nature of the claims involved, summary judgment was inappropriate. *See* Petitioners' Brief at 11-12, fn. 8. Petitioners' briefs filed in support of their argument in the Court of Appeals in *Webb II* failed to contain references to specific facts before the District Court to demonstrate that genuine issues existed and failed to provide a reasoned discussion of Judge Tinder's lengthy and detailed analysis of the facts as applied to their claims in his January 5, 2000 ruling.

The record below demonstrates that Petitioners submitted a significant amount of evidentiary material to the District Court in their effort to avoid summary judgment.

See description at p. 11 of Petitioners' Brief. However, Petitioners' approach of simply trying to characterize their claims as the type for which summary judgment is inappropriate ignored the plain dictates of Rule 56(e), Fed. R. Civ. P. which requires the non-movant to identify competent evidence that demonstrates a genuine issue for trial, rather than merely resting on the allegations in the complaint. The Court of Appeals was under no obligation to scour the record to identify facts for Petitioners, or to frame Petitioners' arguments for them.

Petitioners misapprehend the comments in prior decisions of this Court declaring that appellate review of a grant of summary judgment must be on all the evidence in the record. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2098, 2110 (2000). The obligation of the Court of Appeals to consider any competent evidence in the record does not impose upon that reviewing Court the duty to identify those facts for Petitioners. Rule 56(e) charges the non-movant with that responsibility. The District Court repeatedly ruled that Petitioners had failed to allege or submit any evidence in support of their claims.[2] It was Petitioners' obligation to identify to the Court of

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[2] For example, Petitioner Webb maintained that the Respondents had violated his Fourteenth Amendment right to due process by failing to grant him a raise. (Complaint, r. 1 at 11). The District Court ruled that Webb had failed to submit any evidence that he had anything more than a unilateral expectation of a raise, and that did not rise to the level of a property right. (Appendix, p. 32a). On appeal, Webb failed to identify any evidence submitted to the District Court that created a genuine issue that he had a clear entitlement to the raise. Thus, the District Judge granted summary judgment on that issue.

Appeals that evidence which they maintain was presented to the District Court but disregarded, but they failed to do so.

Under these circumstances, the form of review by the Court of Appeals comported with the prior decisions of this Court. Moreover, the detailed opinion of the District Court reveals that it carefully reviewed the voluminous evidentiary submittals and Petitioners' six days of evidence presented at the injunction hearing. The Court of Appeals in *Webb II* was satisfied that Judge Tinder had handled the issues correctly. (*Webb II*, Appendix at p. 2a). In the absence of specific identification by the Petitioners of those parts of the record they believed were misapprehended by the District Court, the Court of Appeals appropriately determined it did not need to order the record to try to find them.

The instant case presents no question of general importance. The record and opinions below merely reflect that Petitioners believed that if they alleged enough claims of a certain kind or character, they would be relieved of their burden under Rule 56(e). This does not warrant a review by this Court.

Petitioners also misstate the record and the effect of prior precedent by alleging, at page 14 of their Brief, that the Court of Appeals improperly relied on the facts from *Webb I*. The opinion in *Webb II* merely indicates that the Seventh Circuit found it unnecessary to repeat the detailed history of the "meltdown" of the Criminal Justice Department under Dr. Webb because it had previously recited those facts in *Webb I*. (See Appendix, pp. 111a-117a). The opinion in *Webb II* also observed that

Judge Tinder had provided a detailed history in his 87 page opinion granting summary judgment. (Appendix, p. 2a).

There is no suggestion in the opinions of the District Court or the Court of Appeals that findings made at the preliminary injunction hearing were used on summary judgment to dispose of Petitioners' claims. In fact, the District Court did not make detailed findings after the injunction hearing, and that was one of Petitioners' complaints in their first appeal in *Webb I*. (See Appendix, p. 114a). The opinion of the District Court granting summary judgment evidences that the District Judge paid close attention to the nature of Petitioners' claims and whether any of the evidence they identified in their several Statements of Genuine Issues was material to their claims. The Court of Appeals properly concluded that the District Court had determined the issues correctly.

B. The District Court properly granted Summary Judgment to Respondents because Petitioners could not show any genuine issues of material fact

The arguments at pp. 17-21 of Petitioners' Brief underscore the central theme of both *Webb I* and the District Court's January, 2000 opinion granting summary judgment: Petitioners have many complaints, but they completely failed to articulate facts that supported a cause of action under 42 U.S.C. § 1983 or Title VII. For example, Petitioners repeatedly made claims like Webb's assertion that his desire to teach certain courses was an "entitlement" rising to the level of a property interest, or

that his removal as Department Chairperson because he was insubordinate to the Dean violated his liberty interests. (Appendix, pp. 33-34a, 38a-39a). Petitioners failed to appreciate the elements of property or liberty interests under the Fourteenth Amendment, and failed to present evidence to the District Court demonstrating the existence of a genuine factual issue as to such claims.

Similarly, all the evidence before the District Court illustrated that Webb's complaints to the Board of Trustees and others were internal communications on matters of private concern to him in prosecuting his feud with the administration of the University. (Appendix, pp. 45a-50a). The District Court carefully considered the "speech" that Petitioners claimed was entitled to First Amendment protection and found that its content, form, and context compelled the conclusion that it was on matters of private concern. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983); *Colburn v. Trustees of Indiana Univ.*, 975 F. 2d 581, 583-585 (7th Cir. 1992).

Petitioners' Title VII claims suffered from similar evidentiary deficiencies. Many of the claims were not preserved in administrative charges to the Equal Employment Opportunity Commission. (Appendix, pp. 61a-64a, 70a-72a, 78a-79a). *See, e.g. Cheek v. Western and Southern Life Ins. Co.*, 31 F. 3d 497, 500 (7th Cir. 1994). Others simply failed to allege any adverse action as a result of protected activity. (Appendix, pp. 67a-68a, 80a-81a). *Smart v. Ball State University*, 89 F. 3d 437, 441 (7th Cir. 1996); *Crady v. Liberty National Bank*, 993 F. 2d 132, 136 (7th Cir. 1993). The District Court properly granted summary judgment as to the remainder of the Title VII claims because Petitioners failed to offer any

evidence that suggested that Respondents' explanations for the employment actions at issue were pretextual. (Appendix, pp. 69a-70a, 75a-78a, 81a-82a). *Feldman v. American Memorial Life Ins. Co.*, 196 F. 3d 783, 793 (7th Cir. 1999). The District Court correctly found that multiple reasons existed to grant summary judgment on these claims and applied governing law in the Seventh Circuit accordingly.

Finally, Petitioners mix and confuse the District Court's ruling from the bench denying the preliminary injunction, and the detailed opinion issued two (2) years later granting summary judgment to the Respondents. (Petitioners' Brief at 21). At no point in the opinion granting summary judgment did the District Judge indicate he was adopting or relying upon his ruling denying preliminary relief. The Petitioners requested and were granted permission to augment their responses to the summary judgment motions by references to the transcript of the injunction hearing. (R. 146, 149). However, this was simply a submission of the type of evidence contemplated by Rule 56(e).

The District Court did properly note at the injunction hearing that Petitioners failed to offer any evidence that the actions about which they complained as violating their First Amendment rights were committed with a retaliatory motive. (R. 109 at 115, 284; 115 at 1404). This was a correct statement of the law. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Cromley v. Board of Educ.*, 17 F. 3d 1059, 1068 (7th Cir. 1994). The District Court's opinion granting summary judgment, however, did not reach the issue of whether or not there was evidence that Respondents' actions were motivated

by Petitioners' allegedly protected speech because Judge Tinder concluded the speech was on matters of private concern and thus not protected. (Appendix, pp. 43a-50a).

The Court of Appeals correctly affirmed the District Court because Petitioners failed on appeal to demonstrate any errors in the District Court's conclusions about the deficiencies in Petitioners' factual submissions. Nothing in this process deviated from established precedent in this Court or established principles of summary judgment. Accordingly, the Petition should be denied.

C. The District Court properly denied Petitioners' untimely and unsupported motion to conduct further discovery

In the Seventh Circuit, the standard of review of a District Court's decision on a matter involving management of discovery is whether the Court abused its discretion. *Brill v. Lante Corp.*, 119 F. 3d 1266, 1275 (7th Cir. 1997). On appeal, Petitioners maintained their August 12, 1999 motion for leave to conduct additional discovery should have been construed as a motion for a continuance pursuant to Rule 56(f). A District Court's denial of a Rule 56(f) motion is also reviewed by an abuse of discretion standard. *Farmer v. Brennan*, 81 F. 3d 1444, 1449 (7th Cir. 1996). The Court of Appeals correctly ruled that the District Court's denial of Petitioners' August 12, 1999 motion was a proper exercise of its discretion.

Petitioners filed their complaint on August 4, 1997. The forty-eight (48) page complaint contained a recital of a course of events occurring over four (4) years and involving the governing Board of the University, most of

the administration, a number of faculty committees, and the majority of Petitioners' academic colleagues in the CJC Department. The scope of the action would suggest that Petitioners might have recognized the need to conduct discovery. However, they made no effort to take depositions or serve discovery requests until the August, 1999 motion.

Federal Rules of Civil Procedure 33, 34 and 36 impose no limitation upon when a party may conduct discovery. In the case at bar, over two and one-half months passed between the filing of the complaint and receipt by Petitioners of Respondents' dispositive motions. After receipt of those motions, Petitioners sought and received an enlargement of time until January 2, 1998 to file responses. (R. 78). Still, however, Petitioners did not conduct any discovery. Instead, they filed a motion for a preliminary injunction on December 12, 1997. (R. 80). Attached to this motion were thirty-four pages of affidavits from Petitioners. Petitioners then filed their responses to the summary judgment motions on December 29, 1997, attaching more affidavits; one from each Petitioner, consisting of thirty-seven (37) total pages.[3] From this pattern, it is apparent that Petitioners pursued a conscious strategy to oppose the summary judgment motions by submitting their own view of events instead of conducting discovery from the Respondents.

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[3] These submissions included affidavits from Dr. Susan Sayles, who was also a Plaintiff in the proceedings below. Before the Court of Appeals ruled in *Webb II*, Dr. Sayles dismissed her appeal.

Moreover, the Petitioners presented six (6) days of evidence at the injunction hearing in December, 1997 and January, 1998. This included examining as hostile witnesses their two principal adversaries – Dean Johnstone and Provost Vander Hill – in what the Court of Appeals described as the "warfare" that had raged in the CJC Department, causing it to "melt down". *Webb I.* (Appendix, p. 111a, 117a). It was during the course of this hearing that the District Judge reminded Petitioners' counsel that evidence of the motivation of these parties was critical to his determination. (R. 109 at 115, 284). After the District Court ruled on January 8, 1998 denying the application for injunctive relief, Petitioners again conducted no discovery and instead requested a stay of proceedings while the injunction ruling was on appeal. (R. 124).

The appeal in *Webb I* was disposed of and the mandate received in the District Court on March 18, 1999. Petitioners then took no action for five (5) months until they requested on August 14, 1999 that the District Court vacate the stay and permit them to conduct discovery or file more affidavits. (R. 147). That motion was unsupported by the affidavit required by Rule 56(f) explaining why more time was necessary to conduct the discovery.

When Petitioners filed their first response in December, 1997 to the pending motions, they requested, due to the burden of preparing for the injunction hearing, that they be granted additional time after the hearing within which to submit additional arguments and materials. (R. 87). However, in the text of this request Petitioners made no mention of any need to depose any University Respondent or serve any discovery requests, and it was

not presented as a Rule 56(f) motion. Instead, on January 22, 1998, Petitioners filed a Second Amendment Statement of Genuine Issues referencing their affidavits.

The record in this case reveals that before their August, 1999 motion the Petitioners had two significant periods of time in which to conduct discovery, but they failed to do so. Ample precedent in the Seventh Circuit holds that a party should not be rewarded for being dilatory in conducting discovery. *Grundstad v. Riff*, 166 F. 3d 867, 873 (7th Cir. 1999); *Jones v. Merchants Nat'l. Bank & Trust Co. of Indianapolis*, 42 F. 3d 1054, 1060 (7th Cir. 1994). When the District Court extended the filing date for their responses to the dispositive motions to late December, 1997 and then granted extra time until January 22, 1998 Petitioners were on notice that the District Court expected their responses to be complete by that time. Rule 56(e) plainly requires the non-movant to gather and submit that evidence which the party believes shows there is a genuine issue for trial. It does not suggest that the party may do it piecemeal or assume entitlement to more opportunities. If the evidence is unavailable, Rule 56(f) permits the party to seek a continuance, but Petitioners failed to do this and the District Judge was entitled to consider the submissions complete and commence work on an opinion.

The District Court correctly exercised its discretion and followed established precedent in denying Petitioners' August, 1999 motion for leave to conduct discovery. The motion was not only untimely, but it failed to include the affidavit required by Rule 56(f) detailing why the Petitioners had been unable to obtain the desired

evidence or how they believed a continuance would permit them to obtain it. (Appendix, p. 108a). Petitioners were aware that Rule 56(f) applied to their situation because they cited it in their August 12, 1999 motion. (R. 146 at 9). The brief of Petitioners in the Court of Appeals suffered from the same deficiency. (*Webb II*, Appendix, p. 2a). Under governing precedent in the Seventh Circuit, this omission was grounds to deny the request. *Williams v. National R.R. Passenger Corp.*, 161 F. 3d 1059, 1063 (7th Cir. 1998); *United States v. All Assets and Equipment of West Side Bldg. Corp*, 58 F. 3d 1181, 1190 (7th Cir. 1995).

Moreover, Petitioners were not prejudiced by the District Judge's ruling. As he pointed out in his opinion denying the request, the record then before him on summary judgment was voluminous. (Appendix, p. 108a). Petitioners were permitted to provide to the District Court citations to the record from the preliminary injunction hearing. (R. 149 at 2-3). This record contained 138 pages of testimony from Provost Vander Hill. (R. 109 at 145-283) and 101 pages from Dean Johnstone (R. 110 at 436-536). These University administrators were principal targets of Petitioners' complaints, and were called by Petitioners during the January, 1998 hearing as adverse witnesses. Because the injunction was requested to restrain what Petitioners claimed was ongoing retaliation, the District Judge repeatedly reminded counsel for Petitioners that unlawful intent, or a motivation to retaliate for protected conduct, was what they had to prove. (R. 109 at 115, 167-68, 277, 284; R. 110 at 402, 452). Some of those admonitions occurred during Provost Vander Hill's testimony. Thus, the Petitioners had an ample opportunity to explore the state of mind of the Respondents,

and were not prejudiced by the District Court's August, 1999 order denying further discovery.

Finally, Petitioners allege that the proceedings below are inconsistent with this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998). Petitioners did not make this argument to the District Court when they moved for leave to conduct additional discovery over one year after the decision in *Crawford-El*. For this reason alone, this Court should deem the issue waived. *See Jenkins v. Anderson*, 447 U.S. 231, 234 (1980) (citing *Dorszynski v. U.S.*, 418 U.S. 424, 431, n.7 (1974)).

The claims in the case at bar were baseless and insubstantial, as the District Court's opinion granting summary judgment demonstrates. *Crawford-El* recognizes that limited discovery may not be appropriate in such cases. *Id.* at 593, 598. Discovery in such cases may merely be a tool to harass public officials. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this regard, Respondents deem it important to note that the District Court did not grant summary judgment on Petitioners' § 1983 claims because of a failure to offer evidence of improper retaliatory motive. The judgment was based upon the determination of the District Judge that Petitioners had shown no facts evidencing a protectible property or liberty interest, and that the speech in issue was on matters of private concern. Therefore, even if the District Court had allowed limited discovery, it could not have changed the outcome on summary judgment.

The record below demonstrates that the District Court properly exercised its discretion to deny further discovery and that the Court of Appeals correctly applied

Circuit precedent to affirm that decision. Nothing in this course of events was contrary to established precedents of this Court or of the kind or character of action that requires the exercise of this Court's supervisory authority. The Petition should be denied.

III. CONCLUSION

For the reasons stated above, Respondents respectfully request that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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